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No. 90-1437

FILED
MAY 6 1991
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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FREDERICK LEON DOTSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, in dismissing petitioner's motions for collateral relief under 28 U.S.C. 2255 without an evidentiary hearing, the district court denied petitioner a fair opportunity to demonstrate cause for his prior failures to present claims raised in the motions and resulting prejudice.

2. Whether the district court erred in finding that there were legitimate nondiscriminatory reasons for the prosecutor's peremptory challenges to some black jurors.

3. Whether a transfer of venue from one division in the Northern District of Mississippi to another division in the same district constituted purposeful discrimination on the basis of race.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A20), which is noted at 912 F.2d 1466 (Table), and an order on rehearing (Pet. App. A1-A2) are not reported. The opinion of the district court (Pet. App. A22-A44) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. An order modifying the court of appeals' opinion and otherwise denying a petition for rehearing was entered on November 1, 1990. Pet. App. A1-A2. The petition for a writ of certiorari was filed on January 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on one count of conspiracy to possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 846; two counts of attempted tax evasion, in violation of 26 U.S.C. 7201; and six counts of possessing and distributing marijuana, in violation of 21 U.S.C. 841(a). The district court sentenced petitioner to a total of 15 years' imprisonment, to be followed by four years of special parole, and fined him $70,000. Gov't C.A. Br. 1-2. On direct appeal, the court of appeals affirmed. 817 F.2d 1127, as modified, 821 F.2d 1034 (1987). The petition seeks further review of the denial of petitioner's motions for collateral relief under 28 U.S.C. 2255.

1. Petitioner filed two Section 2255 motions. The first alleged that his trial counsel had been ineffective in certain respects. A second motion, filed shortly thereafter, advanced more than 20 additional grounds. See Pet. App. A42; C.A. Record Excerpts, Doc. 8. The district court considered both motions together and denied them without a hearing. Pet. App. A22-A44. The court specifically addressed and rejected each of petitioner's claims, concluding that they "have previously been decided on direct appeal, contain no constitutional violation, or lack support in the record." *Id.* at A44.

Three of petitioner's claims are material to his request for this Court's review; the facts relevant to those claims are as follows:

a. More than a month before petitioner's trial, the district court entered an order transferring the case from Greenville, in the Greenville Division of the Northern District of Mississippi, to Oxford, in the Western Division of the same district. Gov't C.A. Br. 7. Petitioner did not object to the transfer or move for a change of venue, nor was the transfer challenged on direct appeal. *Ibid.*

In his second Section 2255 motion, petitioner alleged for the first time that he had been prejudiced by the transfer of the case. He argued that because 58% of the residents of the Greenville Division are black and 30% of the residents of the Western Division are black, the transfer had the unconstitutional effect of excluding blacks from the jury. C.A. Record Excerpts, Doc. 8, at 1-2. Petitioner also argued that the transfer was arbitrary and caused substantial inconvenience to trial counsel and to defense witnesses. *Id.* at 5.

The district court held that, to the extent petitioner was challenging the effect of the transfer on the petit jury array, the claim was barred by Fed. R. Crim. P. 12(b). A challenge to the petit jury array, the court explained, is among the motions that Rule 12(b) requires to be made before trial, and the rule governs collateral review in the absence of a showing of "both 'cause excusing his double procedural default' and 'actual prejudice' resulting from the alleged error." Pet. App. A24-A27. The court determined that petitioner had shown neither cause nor prejudice. *Id.* at A27-A28. The court found that petitioner's assertion that the transfer had unjustifiably inconvenienced trial counsel and defense witnesses was "clearly frivolous," explaining that "the trial site was properly determined by the court in its discretion and was not challenged by [petitioner] prior to this proceeding." *Id.* at A28-A29.

b. When petitioner's case was tried, *Batson* v. *Kentucky*, 476 U.S. 79 (1986), was pending before this Court but had not yet been decided. During jury selection, the prosecutor used five of his six peremptory challenges against blacks. The sixth peremptory challenge was used against a white. The jury ultimately consisted of 11 whites and one black. During jury selection, petitioner's trial counsel moved to strike the jury panel or set aside the prosecutor's peremptory challenges, arguing that those challenges were racially motivated and that their effect was to deny petitioner and

his co-defendant a racially balanced jury. Gov't C.A. Br. 9-10.

The district court reserved ruling on the motion until after the trial. At that time, the prosecutor volunteered the reasons for his peremptory challenges. He explained that because the case involved tax offenses as well as drug offenses, he sought jurors from particular backgrounds. To that end, he had obtained information on as many potential jurors as he could from sheriffs and elected officials in the counties from which the venire was drawn. The prosecutor then advised the court of the information—and its source—underlying each of his peremptory challenges. Gov't C.A. Br. 10; C.A. Record Excerpts, Doc. 7, at 1431-1432.

The government's first strike, of a black ambulance driver, was based on information obtained from the sheriff and county attorney of the juror's county that he "was not a reliable juror," and "would be likely to turn a drug dealer loose." The subject of the government's second strike was a black woman who lived on the border between two counties. Law enforcement officers in both counties advised that in the instant case "she would be very fearful and might not make a good juror." The government's third strike was exercised against a black man after two black police officers in his home county stated their belief that "he perhaps would not make a good juror." In addition, although the juror's information sheet stated that he could not read, he did not acknowledge that fact during *voir dire*. Gov't C.A. Br. 10-11; C.A. Record Excerpts, Doc. 7, at 1433-1434.

The government next struck a black man who, according to information provided by the sheriff and a black deputy sheriff in his home county, had been arrested for raping his daughter and, in addition, could not read well. The subject of the government's fifth strike was a white woman whose son, according to the sheriff in her county, "had been involved in drugs," and who "might have bad feelings

against narcotics agents." The government exercised its sixth strike against a black woman whose family, local police officers had said, "was constantly in trouble with the law" and "had disturbance calls about every month." The officers felt that the woman "would not make a good juror." Gov't C.A. Br. 11; C.A. Record Excerpts, Doc. 7, at 1435-1437.

In the course of his statement, the prosecutor observed that the most desirable juror from the government's standpoint was a black college counselor who was well educated and appeared to have a dominant personality. The prosecutor also noted that 17 of the government's 32 witnesses were black, including the case agent from the Mississippi Bureau of Narcotics. Gov't C.A. Br. 10; C.A. Record Excerpts, Doc. 7, at 1431, 1436-1437.

The district court invited defense counsel to respond to the prosecutor's statement. Without questioning the validity of the prosecutor's representations, defense counsel renewed the motion and argued that the government's peremptory challenges "effectively prevented us from having any type of reasonable cross-section of racial—of a racially balanced jury." C.A. Record Excerpts, Doc. 7, at 1438.

The district court denied the motion. The court found (Gov't C.A. Br. 11-12; C.A. Record Excerpts, Doc. 7, at 1438-1439):

> All right. It appears to the Court that the challenges exercised by the Government were not done with any racially motivated intent to deprive either of these Defendants of a fair trial, that there were very good reasons existing to challenge these five blacks, who were challenged, and that the government was merely carry[ing] out its duty in trying to get the most intelligent, objective jury possible to hear this case, and there was no prejudice whatsoever in the exercise of the challenges as they were exercised.

Petitioner's trial counsel renewed his challenge to the government's use of peremptory challenges in a motion for

a new trial. The district court denied the motion. Gov't C.A. Br. 12. On appeal, petitioner was represented by new counsel. Although *Batson*'s presence on this Court's docket had been discussed during the colloquy on petitioner's motion and petitioner's counsel on direct appeal was handling a similar case then pending in the Fifth Circuit,[1] petitioner did not advance a *Batson* claim on direct appeal.

Petitioner renewed his *Batson* claim in the second of his Section 2255 motions and argued, for the first time, that the procedure for determining that motion had been deficient. The district court observed that petitioner may have waived his claims by failing to raise them on appeal, but held that those claims had no merit in any event. Pet. App. A30-A31. The district court noted that *Batson* does not require the courts to employ any particular procedures in determining whether a prosecutor has discriminated on the basis of race in the exercise of peremptory challenges, and it reviewed the prosecutor's reasons for striking particular jurors and its prior finding that the strikes were motivated by an attempt to "get the most intelligent, objective jury possible." *Id.* at A32-A34. The court concluded that "the prosecutor articulated 'a neutral explanation related to the particular case to be tried,' as required under *Batson*." *Id.* at A34.

c. The first of the Section 2255 motions argued that petitioner's trial counsel had been ineffective in certain respects—specifically, by failing to object to certain testimony, by failing to seek exclusion of portions of a document admitted into evidence, and by failing to advance legal arguments going to the sufficiency of the indictment, the sentence, and an alleged inconsistency in the verdict. See

[1] Petitioner's attorney on direct appeal, Robert Glass, was the attorney for the appellant in *United States* v. *Leslie*, 759 F.2d 366 (1985), on reh'g en banc, 783 F.2d 541 (5th Cir. 1986), vacated, 479 U.S. 1074, on remand, 813 F.2d 658 (5th Cir. 1987).

Pet. App. A43. The court found that those ineffective-assistance claims were "wholly unsupported by the record"; that none of the asserted deficiencies in trial counsel's performance satisfied the standards established by *Strickland* v. *Washington*, 466 U.S. 668, 687-688, 694 (1984), for such claims; and that trial counsel "was an experienced and capable trial attorney." Pet. App. A42-A44.

2. The court of appeals affirmed the dismissal of petitioner's Section 2255 motions. Pet. App. A1-A2, A3-A20. At the outset, it rejected petitioner's contention that the district court erred in denying his Section 2255 motions without a hearing. The court of appeals noted that no hearing is required if "the motion and files and the records of the case conclusively show that the prisoner is entitled to no relief," and, based upon its analysis of each of petitioner's claims, it concluded that petitioner was "clearly entitled to no relief." Pet. App. A5-A6.

With respect to the intra-district transfer, the court noted that petitioner had "'no right to trial within a particular division in a district,' and [that] the trial judge has broad discretion in making a transfer." Pet. App. A7. Petitioner failed to identify any respect in which the transfer caused his trial counsel's performance to be deficient, the court of appeals continued, and petitioner had waived the claim in any event by failing to raise it prior to trial. *Id.* at A7-A8.

The court of appeals set forth its grounds for rejecting petitioner's *Batson* claim in an order on rehearing. Pet. App. A1-A2 (replacing *id.* at A8-A9). In that order, the court noted that on direct appeal petitioner had not challenged the prosecution's use of peremptory strikes, the racial composition of his petit jury, or the timing of the trial court's *Batson* inquiry. *Id.* at A2. The court held that because petitioner had failed to demonstrate cause for that procedural default and resulting prejudice, the claim could not be raised on collateral review. *Ibid.*

The court of appeals addressed on the merits, and rejected, the particular claims raised in petitioner's first Section 2255 motion regarding the ineffectiveness of his trial counsel. Pet. App. A17-A20. The court declined, however, to consider petitioner's contentions, advanced for the first time in the Section 2255 appeal, that his trial counsel had been ineffective in failing to advance the various claims set forth in his second Section 2255 motion and that his counsel on direct appeal had been ineffective. Pet. App. A17.

## ARGUMENT

1. Petitioner contends that the summary dismissal of his Section 2255 motions denied him an adequate opportunity to demonstrate cause excusing his failure to preserve claims of error advanced in the motions and to show prejudice flowing from those alleged errors. Pet. 8-12.

Section 2255 provides, in pertinent part, that the court shall grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Similarly, Rule 4(b) of the Rules Governing Proceedings under Section 2255 provides that "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the [court] shall make an order for [the motion's] summary dismissal." When a court considers whether summary dismissal is warranted, "the allegations of the motion need not be accepted to the extent that they are contradicted by the court's own records." 3 C. Wright, *Federal Practice and Procedure* § 599, at 492 (2d ed. 1982). See *United States* v. *Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988); *Shraiar* v. *United States*, 736 F.2d 817, 818 (1st Cir. 1984). Unsupported generalizations and claims decided on direct appeal also do not call for a hearing. *United States* v. *Fishel*, 747

F.2d 271, 273 (5th Cir. 1984); *United States* v. *Burroughs*, 650 F.2d 595, 599 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *Aeby* v. *United States*, 409 F.2d 1, 2 (5th Cir. 1969).

In this case, the record of the prior proceedings in the district court and the court of appeals on direct appeal established that petitioner was entitled to no relief from his conviction. The district judge who presided over the prior proceedings in the case also heard petitioner's Section 2255 motions. In a comprehensive opinion, the district court addressed each of petitioner's allegations of prejudicial error in detail and concluded that "the motion and the file and records of the case conclusively show that the prisoner is entitled to no relief." Pet. App. A44. The court of appeals correctly joined in that conclusion. *Id.* at A6.

Petitioner argues that the summary dismissal of his motions denied him the opportunity to show cause and prejudice with respect to his claims. That argument is without merit. First, the courts below did not rely exclusively on petitioner's procedural defaults in rejecting his claims. In many instances, the courts addressed those claims on their merits and found them to be insufficient as a matter of law. See, *e.g.*, Pet. App. A6-A8, A11-A12, A13-A20. No showing of cause and prejudice could have entitled petitioner to relief on those claims.

Second, although petitioner now argues that the ineffectiveness of his prior attorneys should excuse his untimely assertions of various claims, neither of his Section 2255 motions alleged that counsel had been ineffective in failing to present those claims at an earlier stage. Petitioner's first Section 2255 motion alleged only that petitioner's trial counsel had been ineffective in certain specified respects. Both the district court and the court of appeals rejected that claim on the merits. See Pet. App. A17-A20, A42-A44. Petitioner's other Section 2255 motion raised a host of new claims, but did not supplement the prior ineffective

assistance claim (except to suggest, in passing, that counsel had been inconvenienced by the intra-district transfer). It was not until the appeal from the denial of the Section 2255 motions that petitioner argued, for the first time, that his prior appellate counsel had been ineffective and that trial counsel had been deficient in failing to advance the issues raised by the second Section 2255 motion. The court of appeals was not required, on the basis of this belated extension of petitioner's ineffective assistance claim, to reverse the district court's judgment and remand for a hearing.[2]

2. Petitioner also contends (Pet. 13-17) that the district court erred in its handling and disposition of his *Batson* claim.

The court of appeals correctly held that because petitioner did not raise his *Batson* claim on direct appeal, he is not entitled to collateral relief unless he can show both cause for his procedural default and actual prejudice. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Murray* v.

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[2] Contrary to petitioner's contention (Pet. 9), none of the cases in which this Court found a hearing necessary involved comparable facts. In *Blackledge* v. *Allison*, 431 U.S. 63, 77-78 (1977), the record was silent as to sentencing concessions allegedly promised to the defendant during secret plea bargaining. In *Sanders* v. *United States*, 373 U.S. 1, 19-20 (1963), the facts upon which the Section 2255 motion was predicated related to the petitioner's mental competence and were outside the record. In *Machibroda* v. *United States*, 368 U.S. 487 (1962), the district court failed to ask whether the defendant wished to make a statement at the time of sentencing, *id.* at 488-489, and this Court specifically noted that "[t]his was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court," *id.* at 494.

Petitioner also relies (see Pet. 9-10) on a number of Fifth Circuit decisions. This case does not depart from the standards set forth in those decisions, and, in any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

*Carrier*, 477 U.S. 478, 489 (1986) (cause and prejudice standard applies to constitutional claims and defaults on appeal); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). As noted, petitioner advanced an ineffective assistance of counsel claim in his first Section 2255 motion, but he did not assert that his attorney on direct appeal had been deficient in failing to pursue the *Batson* claim. His belated challenge to appellate counsel's representation was insufficient, as a matter of law, to establish cause for his failure to preserve the *Batson* issue. Moreover, for the reasons stated by the district court, petitioner's *Batson* claim is without merit. Thus, petitioner could not have been prejudiced by the omission of that claim from his direct appeal, and he is not entitled to collateral relief.

In keeping with the procedures that are now routinely employed to resolve *Batson* claims, the prosecutor put the reasons for his peremptory challenges on the record. The district court determined—both during the trial and in the Section 2255 proceeding—that the prosecutor's peremptory challenges were not motivated by race and that there were "good reasons" to challenge those blacks who were struck from the jury. Those findings are subject to review under the clearly erroneous standard, and in light of the district court's opportunity to observe the prosecution and the jurors in question, the district court's findings are entitled to "great deference." *Batson* v. *Kentucky*, 476 U.S. at 98 n.21; see *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). The reasons advanced by the prosecutor in this case were not insufficient, as a matter of law, to rebut petitioner's claim of racial discrimination. See *United States* v. *Williams*, 822 F.2d 512, 515 (5th Cir. 1987); *United States* v. *Forbes*, 816 F.2d at 1010-1011; *United States* v. *Wilson*, 867 F.2d 486, 488 (8th Cir.), cert. denied, 110 S. Ct. 92 (1989).

3. Petitioner also asserts (Pet. 12-13) that the district court's intra-district transfer of the venue of his trial constituted purposeful racial discrimination. As the court of

appeals held, petitioner waived that claim by failing to object to the transfer of the case at any time prior to the filing of his Section 2255 motion, see *United States* v. *Greer*, 600 F.2d 468, 469 (5th Cir.), cert. denied, 444 U.S. 902 (1979). The claim is without merit in any event.

In light of the procedures employed in the Northern District of Mississippi, there is no basis for an inference that race played any role in the transfer. The judges sitting in the Northern District of Mississippi are based at particular courthouses, but hear cases throughout the district. Judge Biggers, who was assigned to preside over the trial in this case, is based in Oxford, Mississippi, in the Western Division of that district. A local rule provides that all criminal jury trials are, unless otherwise specially ordered, held in Oxford. Rule CR-1(E)(6)(e), Rules of the U.S. Dist. Ct. for the Northern District of Miss. (effective June 9, 1980). In this case, the record does not reflect why petitioner's trial was initially set for trial in Greenville or why Judge Biggers transferred the case to Oxford. But in any event, the effect of the transfer was only to return the case to the courthouse in which Judge Biggers is based and in which all criminal jury trials in the district are presumptively set. "[T]here is no right to trial within a particular division in a district," and, under Fed. R. Crim. P. 18, a district judge "has 'broad discretion in determining whether transfer within a judicial district is warranted.'" *United States* v. *Weddell*, 800 F.2d 1404, 1406, on reh'g, 804 F.2d 1343 (5th Cir. 1986). Neither the government nor petitioner objected to the transfer. Even assuming that petitioner's statistics regarding the racial composition of the jury pools in the Greenville and Western Divisions are correct, the facts provide no support whatever for a claim of purposeful racial discrimination.

Numbers alone do not make out a *prima facie* case of purposeful discrimination. See *United States* v. *Jordan*, 893

F.2d 182, 183-184 (8th Cir.), vacated on other grounds, 110 S. Ct. 2581 (1990); *United States* v. *Fuller*, 887 F.2d 144, 146-147 (8th Cir. 1989), cert. denied, 110 S. Ct. 2592 (1990). Rather, "all relevant circumstances" should be considered, *Batson*, 476 U.S. at 96-97, and "[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 190 (1981). In this case, the Section 2255 motion failed to set forth any facts from which an inference of purposeful discrimination could be drawn, and there was thus no need for further proceedings on petitioner's discrimination claim.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 262-761/20524